IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1034 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-
and
Hon'ble MR.JUSTICE D.P.BUCH sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHHAGANBHAI JOKHAMBHAI KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1034 of 1992

MS BANNA S DUTTA for Petitioner No. 1 - (absent)

Mr.K.P.Raval, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 10/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. The appellant - accused has challenged in this Appeal the impugned Judgment and order of conviction dated 17.10.1992 passed by the learned Sessions Judge, Panch Mahals at Godhra in Sessions Case No.102 of 1991 convicting the appellant - accused for the offence u/s. 302 of Indian Penal Code for committing murder of Kokila, wife of his real brother Motibhai (complainant) on 13.2.1991 at 8.00 a.m. at village Merap of Bariya Taluka, District Panch Mahals.

2. The charge is at Ex.2. It is the prosecution case that because of the property dispute and that the appellant - accused was having impression in his mind about deceased Kokila that she was Witch he committed murder of Kokila on 13.2.1991 at 8.00 a.m. by giving "Kosh" (Iron Rod) blows on the right shoulder and left hand and left leg of deceased Kokila. In support of its case the prosecution has examined complainant Motibhai, P.W. 4, Ex.25, his real son Rajesh, P.W.5, Ex.26, as eye witnesses and one more witness Dhanabhai, P.W. 6, Ex.27, who was Sarpanch before whom the deceased alleged to have made oral Dying Declaration, were examined. In addition to that Dr.Kailash Devda, P.W.8, Ex.32, Medical Officer, Baria, who treated deceased Kokila and then referred to the deceased at Baroda, Dr.Jyotikumar Dayashanker Vyas, P.W. 12, Ex.35, who had treated Kokila at Vadodara Hospital when she was brought in semi-unconscious condition. Dr.Rakesh Narendra, P.W. 2, Ex.21, was examined to prove that all the injuries collectively were sufficient, in ordinary course of nature, to cause the death. He performed the Post Mortem and prepared Post Mortem Note.

3. This is an Appeal of 1992 which was filed through Jail. Ms.Banna Datta was appointed to defend the appellant - accused on 6.12.2001. At the request of Ms.Banna Datta we kept this matter on today, but unfortunately she was not present when this matter was called out at 11.00 a.m. After hearing learned A.P.P. Shri Raval we have to decide this matter because the appellant - accused is in jail since long.

4. As per the prosecution case the complainant Motibhai, P.W.4, Ex.25 was the only eye witness. However, he has supported the prosecution case in his chief examination, but in his cross examination he has stated that on hearing the shouts of his wife he reached at the place of incident. When he reached there accused was not present. He has admitted that his wife had told

him that some person gave 2 to 3 blows on her hand and ran away. She had not disclosed the name of the assailant. This admission on the part of Motibhai is sufficient to discard his evidence. From this admission it is clear that he reached the place of incident only after the assault was over. The appellant - accused was never present there and immediately after reaching the place of incident his wife had not disclosed the name of appellant - accused and simply stated that some one gave 2 to 3 blows on her hand. In this view of the matter we are of the considered opinion that the evidence of Motibhai, P.W. 4 was not at all reliable.

5. Rajesh Motibhai, P.W.5 is the son of complainant Motibhai. He has also tried to pause as if he had witnessed the incident, but in his cross examination he had given different version. Firstly, he stated in his cross examination that on hearing the shouts of his mother he came out, accused Chhagan was not there. Then he said that he (accused) was walking. Then he stated that when the accused gave blow he intervened and accused left with "Kosh" (iron bar). Thereafter, he raised shouts and on hearing his shouts his father Motibhai came there. Whereas, as per the evidence of Motibhai when he raised shouts his son Rajesh and his wife came there. This shows that the evidence of Rajesh was highly unreliable and could not have been relied upon by the learned Sessions Judge.

6. Another witness Dhanabhai, P.W. 6, Ex.27, was the Sarpanch. He deposed in his chief examination that deceased Kokila stated that accused beat her. However, in his cross examination he has clearly stated that when his statement was recorded by the police he has not disclosed before the Police that Kokila stated so that accused gave her blows. Later on he had admitted in his cross examination that the complainant Motibhai came and told him that at about 6.00 a.m. some unknown person gave blows to his wife and ran away and thereafter they had falsely involved the name of his brother as accused because of the enmity between them. He had also admitted that deceased Kokila stated before him that she was not able to identify the assailant, but due to suspicion only she had inferred that she must have been beaten by her brother in law i.e. accused. Such type of evidence cannot be relied upon for the purpose of convicting the accused.

7. Except the aforesaid evidence there is no evidence which involves the appellant - accused with the commission of the offence. We have carefully gone

through the evidence of the three doctors examined by the prosecution. Only one Dr.Rajesh, who had performed the Post Mortem Note, stated in his evidence that all the injuries collectively were sufficient, in ordinary course, to cause the death of the deceased, but not individually. However, that is not the evidence of two other witnesses. Under the circumstances it is clear that the assailant had not selected the vital part of the body and caused only three injuries on right shoulder and left hand and leg of the deceased. In that view of the matter even if we had come to the conclusion that the evidence of the prosecution witnesses were wholly reliable then also the accused could not have been convicted for the offence u/s.302 I.P.Code, but at the most he could have been convicted for the offence u/s. 326 I.P.Code. The appellant - accused has remained in jail for nearly 10 years. In that view of the matter we would have passed sentenced which he had already undergone.

8. As stated earlier, we are of the considered opinion that in the instant case the evidence of the prosecution witnesses is not reliable, more particularly 2 witnesses the complainant Motibhai and his son Rajesh, they were highly interested witnesses, not only that but they were enimical to the appellant - accused. Their relations were strained, therefore, in absence of evidence of any independent witness we would not have relied upon their evidence. Therefore, in absence of any independent witness, it would have been difficult for this Court to convict the appellant - accused on that testimony.

9. In view of above discussion this Appeal is allowed. The impugned Judgment and order of conviction and sentence passed by the learned Sessions Judge, Panch Mahals at Godhra, convicting the appellant accused for the offence u/s.302 I.P.Code and sentenced him to suffer life imprisonment and to pay fine of Rs.1000/- indefault to further R.I. for six months is hereby quashed and set aside. The order of conviction passed by the learned Judge convicting the appellant - accused u/s.504 I.P.C. is also quashed and set aside. The appellant - accused is ordered to be set at liberty forthwith if not required in any other case. The fine, if paid, be refunded to the appellant - accused.

(B.J.Shethna,J.)

Date : December 10, 2001

(D. P. Buch, J.)

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